UNITED STATED BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
ROBERT GORDON,	)	**Case No. 03-12444 ABC**
	)	**Chapter 7**
Debtor.	)	
	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	**Adversary No. 03-1330 HRT**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT GORDON,	)	
	)	
Defendant.	)	

ORDER REGARDING MOTION FOR COSTS AND APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

This case comes before the Court on Defendant's Motion for Costs and Application for Attorneys' Fees and Expenses [the "Motion"].

The Motion is brought primarily under the Equal Access to Justice Act, 28 U.S.C. § 2412. Defendant seeks an award of $1,001.80 against the NLRB for taxable costs and $124,771.68 in attorney fees under 28 U.S.C. § 2412(b) and/or 28 U.S.C. § 1927. Alternatively, Defendant prays for an attorney fee award under 28 U.S.C. 2412(d) in the amount of $82,331.27.

The parties agreed that the merits of the Motion may be addressed in two parts. The issue of liability is a matter of law. The liability question has been fully briefed and the Court heard oral argument at a telephonic hearing on May 10, 2005. The parties further agreed that the issue with respect to the amount of fees would require the Court to take evidence and that it would be appropriate to address that issue only in the event that the Court finds in Defendant's favor on the liability issue.

William Mascioli and Nancy E. Kessler Platt appeared at May 10, 2005, hearing for the NLRB; James W. Bain and Wesley B. Howard appeared for the Defendant; the Defendant, Mr. Gordon, was also present by telephone. As has been the standard for matters before this Court in this case, the written submissions and oral arguments were exceptionally well done and provided significant assistance to the Court.

I. FACTUAL BACKGROUND

On December 1, 2003, this Court issued its Order Denying Motion for Summary Judgment and Defining Scope of Trial. In that Order, the Court set out the details of the dispute between the NLRB and Mr. Gordon, including an appendix describing the nine rulings issued in the administrative proceedings and by the 10th Circuit Court of Appeals. The Court will not repeat that detailed history.

In those earlier administrative proceedings, on behalf of Mr. Gordon's former union workers, the NLRB ultimately obtained a final money judgment against Mr. Gordon for unfair labor practices. This adversary action was filed by the NLRB seeking a determination that its judgment is non-dischargeable in Mr. Gordon's chapter 7 bankruptcy.

NLRB initially sought a summary judgment in the present action. In that motion, NLRB proceeded on the theory that all of the issues relevant to the Court's determination of its 11 U.S.C. § 523(a)(6) claim had been previously decided during the long history of litigation between the parties. As a result, NLRB claimed that Mr. Gordon should be collaterally estopped from relitigating those previously decided issues in this forum. This Court agreed that, in the process of litigating Mr. Gordon's labor law violations, the vast majority of the issues relevant to this action had been conclusively decided against Mr. Gordon. However, the Court denied summary judgment based upon its conclusion that the intent element relevant to this action had not been determined. Accordingly, the Court held that Mr. Gordon would be estopped from relitigating each and every issue relevant to this dischargeability complaint save for the single element of intent. The summary judgment motion was denied and the scope of trial was narrowed to that one issue.

After it deposed Mr. Gordon, the NLRB again moved for summary judgment based on its belief that testimony elicited at Mr. Gordon's deposition entitled it to judgment on the remaining issue of intent. Mr. Gordon filed a cross-motion for summary judgment expressing the opposite view. The Court agreed with neither position and denied both motions.

As the trial date approached, the Court held an additional hearing on evidentiary issues and conducted the final pre-trial conference. Shortly before the scheduled trial date, the NLRB moved to withdraw its complaint against Mr. Gordon. The Court dismissed the action and Mr. Gordon's liability for NLRB's judgment has been discharged.

II. DISCUSSION

A. Statutory Basis for Defendant's Motion

Mr. Gordon cites three separate statutory provisions to support his requests for costs and attorney fees. The first two provisions fall under the Equal Access to Justice Act ["EAJA"]. EAJA is a fee shifting provision that seeks to level the playing field and strike a balance between the seemingly endless resources of the government and the frequently more modest means of the private litigant. "The Congress recognized that the expense of litigation sometimes deters aggrieved parties from seeking review of, or defending against, unreasonable governmental action. EAJA was enacted to diminish this deterrent effect." *Kopunec v. Nelson*, 801 F.2d 1226, 1229 (10th Cir. 1986) (citing The Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980)).

Title 28 U.S.C. § 2412(b) allows an award of attorney fees to be assessed against the United States in favor of an opposing litigant to the same extent that such fees could be awarded against any other private party and specifically provides as follows:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b). This subsection essentially constitutes a waiver of sovereign immunity such that, with respect to an award of attorney fees, the United States and its agencies are treated on a par with any other private litigant. As a prerequisite to any liability under this provision, there must first be some basis, either statutory or in common law, for an award of fees. Lacking such statutory or common law legal authority for a fee award, § 2412(b) is inapplicable.

Title 28 U.S.C. § 2412(d) makes an award of fees available to a party who prevails in litigation against the United States or one of its agencies, where no other statutory or common law basis for such award exists, upon a showing that the position adopted by the United States was not substantially justified:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in

> any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. §§ 2412(d)(1)(A) & 2412(d)(1)(B).

Finally, Mr. Gordon cites to 28 U.S.C. 1927 as authority for his fee request. That section provides for a fee award against an individual attorney and reads as follows:

> any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

B. The Fee Request Under 28 U.S.C. § 2412(b)

As noted above, § 2412(b) is nothing more than a waiver of sovereign immunity as to attorney fee awards. *Adamson v. Bowen*, 855 F.2d 668, 670-71 (10th Cir. 1988) ("The Equal Access to Justice Act . . . expressly waives immunity against attorney's fee awards."). It provides no independent basis for an award of fees and, instead, is dependent upon the existence of some statutory or common law authority for such fee award. *U.S. v. Aisenberg*, 358 F.3d 1327, 1341 (11th Cir. 2004).

The Court's review of Defendant's moving papers discloses no claim of statutory or common law authority to support an award of fees against the government under § 2412(b). This is not surprising. The Court is not aware of authority, under the National Labor Relations Act ["NLRA"], the Bankruptcy Code, or otherwise, which is applicable to the context of this case. Accordingly, Mr. Gordon's request for fees under 28 U.S.C. § 2412(b) will be denied.

C. The Fee Request Under 28 U.S.C. § 2412(d)

1) Prevailing Party

Section 2412(d) does not rely upon other statutory or common law authority for the award of attorney fees. So long as the criteria enunciated in the statute are met, it does provide an independent basis for awarding fees against the government where the government is not the prevailing party in the litigation. In order to make a fee award under § 2412(d), the Court must find that, from the record in the case, the position of the government was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). However, the threshold determination is whether or not Mr. Gordon is the "prevailing party" in this litigation as that term is used in the EAJA statute. The matter did not proceed to trial because the government withdrew its complaint prior to the scheduled trial date. The Court must determine whether Mr. Gordon is the prevailing party in litigation in which the complaint was withdrawn before the Court had an occasion to make any final determination of the merits of the complaint.

The term "prevailing party" is a legal term of art which appears in numerous federal fee shifting statutes. *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human* Resources, 532 U.S. 598, 603, 121 S. Ct. 1835, 1839 (2001); *see also, e.g.*,2 U.S.C. § 1361 (Congressional employment rights); 7 U.S.C. § 499g (Perishable Agricultural Commodities Act); 15 U.S.C. § 1681 (credit reporting); 17 U.S.C. § 505 (copyright infringement); 20 U.S.C. § 1415 (Assistance for Education of All Children with Disabilities); 26 U.S.C. § 7430 (judicial proceeding brought by taxpayers against IRS); 28 U.S.C. 657 (alternative dispute resolution).

The *Buckhannon* case addresses the viability of the "catalyst theory" in attorney fee cases. Under the catalyst theory, a litigant is considered to be the prevailing party where, after the suit is brought, an agency voluntarily grants the relief sought by the claimant, making the complaint moot. Prior to the *Buckhannon* case, most circuit courts of appeal had adopted that catalyst theory. The issue was brought before the Supreme Court when the Fourth Circuit rejected it. *Buckhannon*, 532 U.S. at 601-602, 121 S. Ct. at 1838-39.

In *Buckhannon*, the Court discussed its prior cases interpreting the term "prevailing party" in various attorney fee statutes employing that term. It found that the central thread running through all of those cases was a change in the legal relationship between the parties

brought about by "enforceable judgments on the merits and court-ordered consent decrees." *Id*. at 604, 1840.

In *Scherer v. U.S.*, 88 Fed. Appx. 316, 2004 WL 214453 (10th Cir. 2004), the Tenth Circuit applied *Buckhannon* to an attorney fee determination under EAJA. *Id*. at 320, 3. In that case, following the filing of the claimant's lawsuit, the Department of Veterans Affairs voluntarily granted the plaintiff's benefit claim. He sought an allowance of attorney fees under the claim that the filing of his law suit acted as a catalyst to secure the favorable benefit determination. The *Scherer* court denied the attorney fee claim under the authority of *Buckhannon*. *Id*. *See, also, Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 1029 (10th Cir. 2001) (Plaintiff was not prevailing party in ADA case, where the plaintiff failed to secure a court judgment on the merits, even if plaintiff's lawsuit caused the defendant to voluntarily discontinue conduct that violated the ADA.).

In this case, the Court's order terminating the litigation was largely a ministerial act approving NLRB's voluntary dismissal. But a voluntary dismissal of an action, even if such dismissal does require a court order under FED. R. BANKR. P. 7041, does not rise to the same level as a court adjudication on the merits or even approval of a consent decree. Mr. Gordon failed to obtain a summary judgment or any affirmative relief by way of court order. The Court's dismissal order in this case does not represent the kind of "alteration in the legal relationship of the parties" required by *Buckhannon*. *Bridgeport Music, Inc. v. London Music, U.K.*, 345 F. Supp.2d 836, 839-40 (M.D. Tenn. 2004); *Babel v. U.S. Dept. of Homeland Sec.*, 321 F. Supp.2d 963, 967 (N.D. Ill. 2004). That means that, under the *Buckhannon* standard, Mr. Gordon is not a prevailing party in this litigation. Because Mr. Gordon is not a prevailing party as required under EAJA, the Court will deny his application for an award of attorney fees and costs under 28 U.S.C. 2412(d).

2) Substantial Justification

Even if Mr. Gordon were the prevailing party, as that term is used in the federal fee-shifting statutes, he could be granted a fee award under § 2412(d) only if the Court could not conclude that the "position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d).

But, what does it mean for the position of the United States to be "substantially justified?" In *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541 (1988), the Supreme Court provided the necessary guidance. As a preface, Justice Scalia explained that "[i]n addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it . . .. 'Substantially justified' is the test the statute prescribes, and the issue should be framed in those terms." *Id*. at 564, 2549.

But, because the term "substantially" is susceptible to varying definitions, Justice Scalia recognized that at least some exposition of the Congressional language was required in this instance.

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" – that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

487 U.S. at 565-66, 108 S. Ct. at 2550 (citations omitted).

The Tenth Circuit utilizes a three part test to determine whether the government's position meets the reasonableness criteria laid down in *Pierce*. It has held that "the government must establish three components to meet this test of reasonableness: a reasonable basis for the facts asserted; a reasonable basis in law for the legal theory proposed; and support for the legal theory by the facts alleged." *Harris v. Railroad Retirement Bd.*, 990 F.2d 519, 520-21 (10th Cir. 1993) (citing *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988)); *see, also, U.S. v. 2,116 Boxes of Boned Beef, etc.*, 726 F.2d 1481, 1487 (10th Cir. 1984).

a) NLRB had a Reasonable Basis for the Facts Upon Which it Relied

The facts relied upon by the NLRB are factual determinations made in various administrative proceedings. Those factual findings have been thoroughly vetted in proceedings before the Board's ALJ; before the Board itself; and before the Tenth Circuit. At the time that NLRB filed its action in this Court, those factual findings were final and non-appealable.[1] The record clearly discloses that NLRB had a reasonable basis for the facts on which it relied in this case.

[1] To be sure, at all stages of this case, Mr. Gordon has expressed his disagreement with those factual determinations as they relate to both the service issues and the facts upon which the findings of labor law violations were based. In his filings before this Court, he has been consistent in his efforts to reargue those factual determinations. This Court has been equally consistent in declining to accept Mr. Gordon's invitation to relitigate matters which are final and binding upon this Court.

b) NLRB had a Reasonable Basis in Law for its Legal Theory

The NLRB filed this action seeking a determination that the judgment it obtained on behalf of Mr. Gordon's former union workers was a non-dischargeable debt. Its legal theory under 11 U.S.C. § 523(a)(6) required that this Court be able to find that Mr. Gordon inflicted willful and malicious injury upon his union employees. In the administrative proceedings before the NLRB, it was conclusively established that Mr. Gordon closed down his union shop; discharged his union workers; and that he intended to convert his business from a unionized operation to one without those union obligations.

In its Motion for Summary Judgment, NLRB argued that it was entitled to receive a judgment based on collateral estoppel. It cited three primary cases in support of its contentions: *In re Piper*, 2002 WL 1369050 (Bankr. E.D. Mich. 2002); *In re Branoff*, 2000 WL 1701366, 165 LRRM 2757 (Bankr. E.D. Mich 2000); and *In re Fogerty*, 204 B.R. 956 (Bankr. N.D. Ill. 1996). In each of those cases, bankruptcy courts had granted judgment to the NLRB based on the collateral estoppel effect of prior proceedings finding that the debtors had violated § 8(a) of the NLRA.

As this Court explained in its order denying the NLRB's summary judgment motion, the Court's review of § 8(a) of the NLRA led it to the conclusion that a finding as to the Debtor's subjective intent was not an essential element of the government's enforcement action in those administrative proceedings. Furthermore, this Court is persuaded by discussions contained primarily in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974 (1998) and *Via Christi Regional Medical Ctr. v. Englehart (In re Englehart)*, 229 F.3d 1163, 2000 WL 1275614 (10th Cir. 2000) (unpublished disposition), that it cannot make a finding as to nondischargeability under § 523(a)(6) without addressing the issue of the Debtor's subjective intent.[2]

The Court reviewed the post-*Kawaauhau* cases of *Piper* and *Branoff*. From its review of those discussions, the Court could not discern that those courts were able to draw conclusions as to the subjective intent of the debtors based solely upon the findings of NLRA violations. As a consequence, the Court did not view *Piper* and *Branoff* as persuasive authority in this case.

Nonetheless, in those cases, other bankruptcy courts did give collateral estoppel effect to findings that the debtors had violated § 8(a) of the NLRA in the context of cases brought under

[2] The case of *Panalis v. Moore (In re Moore)*, 357 F.3d 1125 (10th Cir. 2004), was decided subsequent to the Court's decision on the first summary judgment motion in this case. However, it further underscores the role of the Debtor's subjective intent in a court's determination of nondischargeability under 11 U.S.C. § 523(a)(6).

§ 523(a)(6). Given the existence of that authority, this Court cannot say that the government's legal theory was unreasonable.

c) NLRB's Alleged Facts Provided Reasonable Support for its Legal Theory

On the basis of the NLRB summary judgment motion, the Court was able to dispose of all of the issues necessary to render a judgment in its favor except for the intent issue. The very best that can be said of Mr. Gordon's position in this matter is that the Court granted him the benefit of the doubt and reserved judgment so that it could take evidence on the issue of intent. At the same time, it is clear to the Court that a reasonable person could strongly infer that a person who shuts down his union operations; discharges his union employees; continues substantially similar business activity under new non-union entities; and engages in actions that obscure the ownership of the new entities, may well have done so with an intent to injure those discharged employees. In the Court's view, the NLRB's position with respect to the application of the law to the alleged facts was certainly reasonable. NLRB fell short of being entitled to summary judgment because the facts that were established in the administrative proceedings did not, without more, conclusively establish Mr. Gordon's intent. The record of this case does not convince the Court that it would have been impossible or even unlikely that NLRB could have prevailed on that final remaining issue had it proceeded to trial.

As the Court notes above, Mr. Gordon is not a prevailing party and is, therefore, not entitled to an award of attorney fees under 28 U.S.C. § 2412(d). But even if Mr. Gordon had been a prevailing party, the Court finds that the position of the government in this case was substantially justified and would deny an award of fees under § 2412(d) on that basis alone.

D. The Fee Request Under 28 U.S.C. § 1927

Because, the Court finds that the government's position was substantially justified, it cannot find that the government's attorneys unreasonably and vexatiously multiplied the proceedings in this matter so as to impose liability under 28 U.S.C. § 1927.

III. CONCLUSION

In the above discussion, the Court made reference to EAJA's guiding purpose of leveling the playing field between the government and private litigants. This would certainly appear to be a case demonstrating a substantial disparity between the resources the government was able to bring to bear and those that Mr. Gordon had at his disposal. But, while an understanding of a statute's purpose is helpful, it is the language that Congress chooses to execute that purpose that must guide the Court. In this particular case, the Court was able to take guidance from the nation's highest court as to the language used in the primary EAJA section under consideration.

Under the reading given to the term "prevailing party" by the Supreme Court in connection with the wide array of federal fee shifting statutes, the withdrawal of the government's complaint did not result in the kind of determination of the merits which the Supreme Court's reading of that term requires. As a consequence, Mr. Gordon is not a prevailing party who qualifies for an award of costs and/or attorney fees under EAJA.

It is clear that Mr. Gordon perceives great injustice in the procedures employed and the results obtained in the earlier administrative proceedings which resulted in the judgment being taken against him. But this Court is not permitted nor inclined to second-guess the results of those proceedings. The Court's starting point must be to take the factual findings and the end result of that litigation at face value. That said, and given that other bankruptcy courts have found similar labor law violations to be nondischargeable under § 523(a)(6), the Court finds the government's position in this case to have been substantially justified notwithstanding its ultimate decision not to continue prosecution of its claim. That finding of substantial justification also compels the conclusion that the actions of the government's attorneys were not such that they may be held liable under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings in this case. Accordingly, it is

ORDERED that Defendant's Motion for Costs and Application for Attorneys' Fees and Expenses is DENIED.

Dated this 26th day of May, 2005.

BY THE COURT:

/s/ Howard Tallman
Howard R. Tallman, Judge
United States Bankruptcy Court